89-1159

Supreme Court, U.S.
FILED
DEC 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989.

* * * * * * * * *

DANIEL FERRIS, PETITIONER

V.

THE COMMONWEALTH OF KENTUCKY, RESPONDENTS

* * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF CAMPBELL COUNTY, KENTUCKY

* * * * * * * * *

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January 19, 1990

QUESTIONS PRESENTED

1. Where a criminal defendant moves to suppress evidence of prior guilty pleas on the ground that they were not knowingly and voluntarily made, is it constitutional for a state, via the presumption of regularity of judgments, to place the burden of proof on the defendant to prove that the prior pleas were in fact constitutionally infirm?

2. Where the record surrounding a criminal defendant's plea of guilty is entirely silent, may a state court, in a subsequent proceeding, rely entirely on the fact that the defendant was represented by counsel at the time of the prior plea and thereby hold the plea valid?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Daniel Ferris, and the Respondent, Commonwealth of Kentucky.

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

* * * * * * * * *

DANIEL FERRIS,
PETITIONER

v.

THE COMMONWEALTH OF KENTUCKY,
RESPONDENT

* * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF CAMPBELL COUNTY KENTUCKY

* * * * * * * * *

The Petitioner, Daniel Ferris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Circuit Court of Campbell County, Kentucky, entered in the above-styled proceedings on June 1, 1989.

OPINIONS BELOW

The original order of the Campbell District Court is reprinted in the appendix hereto, p. 1a, infra. [Please note: Orders of the District Court are commonly in the form of notations on the Court's calendar, as was done in this case.]

The opinion of the Campbell Circuit Court is reprinted in the appendix hereto, p. 2a, infra.

The order of the Kentucky Court of Appeals is reprinted in the appendix hereto, p.3a, infra.

The order of the Kentucky Supreme Court is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

In the Campbell County District Court, Petitioner was charged with violation of KRS

189A.010(2)(c) (driving under the influence of alcohol) and KRS 189A.090(2A) (driving with a suspended license). Counsel for Petitioner moved to suppress evidence of two prior guilty pleas but on December 2, 1988 the District Court overruled the motion. See 1a, infra.

Petitioner appealed to the Campbell Circuit Court which affirmed the Order of the District Curt on June 1, 1989. Petitions for Discretionary Review before the Kentucky Court of Appeals and the Kentucky Supreme Court were denied on August 8, 1989 and October 11, 1989 respectively.

The jurisdiction of this Court to review the judgment of the Campbell Circuit Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The seemingly routine facts which have led to this petition may seem somewhat trivial given the scope of litigation common to this Court. Upon the firm belief, however, that no individual's constitutional rights are meaningless, certiorari is sought. In the larger sense, the issues involved in this case are so fundamental to criminal law jurisprudence, they deserve this Courts's attention.

This case began on October 5, 1988 when the Petitioner, Daniel Ferris, drove his automobile along Route 8 in Fort Thomas, Kentucky. Mr. Ferris was subsequently stopped by officers of the Fort Thomas Police Department who cited him for driving under the influence of alcohol and for

operating a vehicle while having a suspended license, violations of KRS 189A.010(c) and 198A.090 respectively. Twice before, in 1984 and in 1985, Petitioner had plead guilty to two prior DUI charges. Pursuant to Kentucky statute, Respondent sought to introduce into evidence the two prior guilty pleas and therefore enhance the sentence.[1]

The taped transcripts of the two prior pleas (84-T-2819 and 85-T-2501) revealed that the District Court merely accepted the pleas without satisfying itself that Mr. Ferris had

---

[1] KRS 189A.010(3) provides: "For a third or subsequent offense within a five (5) year period, [the individual shall] be fined not less than $500 nor more than $1,000 and shall be imprisoned in the county jail for not less than 30 days nor more than 12 months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than 10 days nor more than 12 months."

1988, counsel for the Petitioner moved the District Court to suppress evidence of the prior pleas on the ground that they were not knowingly made. An affidavit, signed by Petitioner, was introduced whereby he averred that he made the prior pleas without having been informed of his right to a jury trial, the right to cross-examine witnesses, the right to use the subpoena power of the court, the right to remain free from self-incrimination, and without being informed that the convictions could be used against him to enhance the penalty should he receive additional convictions within five years. The motion argued that these prior pleas were void, pursuant to Boykin v. Alabama, 395 U.S. 238 (1969).

The District Court overruled the suppression motion citing two grounds. First, the Court argued that as Mr. Ferris had been represented by counsel when he made his prior pleas, it could presume that he had been fully informed of his rights. Secondly, the Court stated that Mr. Ferris had the burden to come forward and prove that the two pleas were constitutionally invalid.

On appeal, the Campbell Circuit Court affirmed the District Court in all respects. Only two decisions were relied on, those being Dunn v. Commonwealth, Ky., 703 S.W.2d 874 (1985) and Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986). Initially, the Circuit Court held:

> The issue presented is whether the Trial Court committed error in allowing the use of appellant's two prior convictions on guilty pleas of driving under the

influence in sentencing on the current charge. The District Court properly ruled that without any evidence of any irregularity, the burden of proof did not shift to the Commonwealth to prove that any prior guilty pleas were knowingly and voluntarily made. The burden remained on appellant until he presented evidence to rebut the presumption of regularity.

P. 2a, infra.

As to the issue of the importance of counsel at the prior pleas, the Court stated at page 3a, infra:

The record reveals that the District Court specifically found that counsel in each action was well qualified and presumed that the appellant had been informed of his rights.

. . .The District Court properly determined that representation of counsel during a guilty plea is an important factor in determining the voluntariness f the guilty plea.

Petitions for Discretionary Review were subsequently filed and denied first in the Court of Appeals, and then in the Kentucky Supreme

Court. Accordingly, this Petition follows.

Also, in the case of Dunn v. Simmons, No. 88-5015 (United States Court of Appeals, 6th Circuit, June 13, 1989) the Respondent has filed a Motion for Discretionary Review with this Court in Petition #89-707 and docketed 58 U.S. Law Week 2055 (Oct. 30, 1989). If this writ is granted or their Petition granted, the cases should be consolidated.

REASONS FOR GRANTING THE WRIT

I. AFTER PETITIONER MOVED TO SUPPRESS HIS PRIOR GUILTY PLEAS ON THE GROUNDS THAT THEY WERE MADE WITHOUT KNOWLEDGE OF HIS CONSTITUTIONAL RIGHTS, IT WAS CONSTITUTIONALLY IMPERMISSIVE TO USE THE "PRESUMPTION OF REGULARITY OF JUDGMENTS" TO PLACE THE BURDEN ON PETITIONER TO PROVE THAT HIS PLEAS WERE CONSTITUTIONALLY INFIRM.

The procedure currently in use in Kentucky is simply invalid. In Boykin v. Alabama, 395 U.S. 238, 243, this Court held:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. . . We cannot presume a waiver of these important federal rights from a silent record.

In this case the record of Mr. Ferris' pleas are entirely silent. No effort, at all, was made by the District Court Judge to satisfy himself that Mr. Ferris knew of the rights he waived by pleading guilty. Our own Kentucky Rule of Criminal Procedure, Rule 8.08 states, "[a judge] shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge." This is no novel idea, but merely a restatement of the accepted law post-Boykin. As

stated by the Sixth Circuit Court of Appeals, Boykin mandates that a conviction based on a guilty plea be reversed unless "the prosecution spreads on the record the prerequisites of a valid waiver of the constitutional rights which a defendant surrenders by pleading guilty." Roddy v. Black, 516 F.2d 1380, 1838-84 (6th Cir. 1975).

This rule is a very necessary one. To an indigent criminal defendant, a plea of guilty may appear the only way out of his or her predicament. The consequences of such an action, however, can be enormous. It is absolutely essential that the defendant realize exactly what it is he or she is about to do. To this end, it is a small burden indeed to require the prosecution and the judge to place on the record information showing

that the defendant's plea was a lucid act.

If this is not done, and the record is silent, only one conclusion can be drawn. That is, that the plea was not knowingly and voluntarily made. If the prosecution now seeks to use evidence of the prior pleas, it is their burden, and their burden alone, to prove that the pleas were valid. As stated in Sizemore v. District Court, 735 F.2d 204, 207 (6th Cir. 1984):

> . . .if a defendant argues in a post-conviction proceeding that his plea was entered without an understanding of the pleas nature and consequences, Boykin places a burden on the state to prove that the defendant's guilty plea was voluntary and intelligent.

The Kentucky courts, however, have devised a practice to work a complete reversal of this rule. Exemplified and supported by the case of Dunn v.

Commonwealth, Ky., 703, S.W.2d 874 (1985), the procedure is as follows. When a defendant argues that a prior guilty plea was constitutionally invalid, no burden shifts to the state. Instead, the presumption of regularity of judgments is invoked and the plaintiff must prove that the plea was invalid. This rule is unconstitutional.

The Dunn case was recently reviewed in Dunn v. Simons, no. 88-5015 (United States Court of Appeals 6th Circuit, June 13, 1989). In this habeus corpus action, the Sixth Circuit Court of Appeals recognized the Kentucky procedure for what it was, a very cute attempt to deprive criminal defendants of their rights. As the court found:

> Federal law governs the appropriate standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States

Constitution. . . . Because the circumstances surrounding the acceptance of a guilty plea necessarily must be examined, federal standards control the limited fact-finding role required of the court in arriving at a determination of this question of law. In view of Boykin and Roddy, we conclude that among those standards must be counted these: Where the record from the trial court is inadequate to affirmatively demonstrate that the plea was intelligent and voluntary, the state may not utilize a presumption to satisfy its burden of persuasion. And, where it seeks to satisfy that burden by supplementing an incomplete contemporaneous record with extrinsic evidence, that evidence must be clear and convincing. Id. at 4. [Emphasis added]

The Sixth Circuit's message was well said. The state may not seek to place its burden onto the shoulders of criminal defendants. After all, it is no burden whatsoever, to make a record complete and conclusive in regard to a defendant's guilty plea. If this isn't done, the state's burden to prove the pleas'

validity is harsh. This is as it should be.

II.WHERE PETITIONER'S RECORD WAS ENTIRELY SILENT, THE STATE COULD NOT RELY SOLELY UPON THE FACT THAT PETITIONER'S PRIOR GUILTY PLEAS WERE MADE WITH COUNSEL PRESENT AND THEREBY DECLARE THEM VALID.

When Petitioner plead guilty in 1984 and 1985, it is unquestioned that he was both times represented by counsel. No one argues that this is not a factor to look at in deciding the issue of whether the pleas were knowingly made. The fact of the matter is, however, that this fact alone cannot substitute for a clear record.

By affidavit, Mr. Ferris swore under oath that no one informed him of the rights he relinquished by pleading guilty. The prosecution offered no evidence to dispute this. The District Court, on its own, noted the fact of

prior representation and presumed and assumed that Defendant had been informed of his rights and based on this assumptionh overruled Defendant's motion.

The Boykin rule was designed as a safeguard for criminal defendants and the duties it imposed were directed at prosecutiorial teams and state judges. Nowhere did the rule place a duty on defense counsel. As this Court is well aware, defendants often enter guilty pleas not only with, but on the advice of counsel. To suggest that such representation alone can take the place of an on-the-record inquisition by the trial judge, is to ignore the real-world practices of courtrooms throughout this country. Such a rule would, with a wink and a nod, render the Boykin case a

nullity in a vast number of cases.

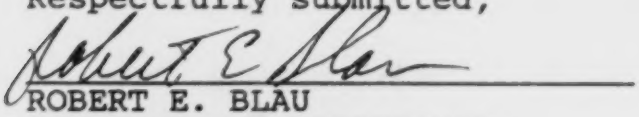
Indeed, it should be remembered that the defendant in the Boykin case was represented by counsel when he made his historic guilty plea. Boykin, supra at 239.

Like the defendant in Boykin, Mr. Ferris' representation by counsel was not sufficient, in and of itself, to render his pleas knowing and voluntary.

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. There is an immediate need for a clear, and final, statement as to the modern status of Boykin.

Respectfully submitted,



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CALENDAR

Commonwealth of Ky. Date:12/2/88
Court of Justice Time:10:30a.m.
Room: 1

Laurie Dowell, Asst. Co. Atty.
Judge Lambert Hehl, Judge

Motion Hearing

88-T-3581 Daniel Ferris	O.R.
Ft. Thomas 10/5/88	J.T.
Bray	10:30
BA-Refused DOB: 6/8/50	1/4
Atty: Berry	3

Judge Signature: /s/ Lambert Hehl

Date: 12/2/88

OPINION

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
SECOND DIVISION
CASE NO. 89-X-004

COMMONWEALTH OF KENTUCKY
Appellee/Plaintiff

-vs-

JUDGMENT

Entered June 1, 1989

DAN FARRIS
Appellant/Defendant

This is an appeal from the Campbell District Court where the defendant entered a conditional guilty plea reserving for appeal the issue concerning defendant's motion to suppress the prior guilty pleas for driving under the influence.

The issue presented is whether the Trial Court committed error in allowing the use of appellant's two prior convictions on guilty pleas of driving under the influence in sentencing

on the current charge. The District Court properly ruled that without any evidence of any irregularity, the burden of proof did not shift to the Commonwealth to prove that any prior guilty pleas were knowingly and voluntarily made. The burden remained on appellant until he presented evidence to rebut the presumption of regularity. Although the case involved a felony charge of persistent felony offender, the case of Dunn v Commonwealth, Ky., 703 SW2d 874 (1985), gives guidance. After the Commonwealth proves the judgments of convictions in each of the previous underlining offenses upon which it intends to rely, the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. The burden then shifts to the defendant. The Trial Court in this case

properly ruled that the mere filing of the affidavit, absent any other proof whatsoever, was not enough to shift the burden over to the Commonwealth. The Trial Court properly ruled that appellant had to give some evidence that would overcome the presumption of regularity.

Appellant also argues that he was not advised of his right to a jury trial, right to cross examine, use of the subpoena power, self incrimination rights, and that a conviction could be used against him to enhance the penalty. Appellant submitted that information in an affidavit. Appellant did not present testimony or other evidence at the motion to suppress. The record reveals that the District Court specifically found that counsel in each action was well qualified and presumed that the appellant had been

informed of his rights. Although involving a conviction for persistent felony offender, the case of Corbett v Commonwealth, Ky., 7171 SW2d 831 (1986), offers guidance. The Trial Judge in this case found that Mr. Farris had retained counsel in the prior driving under the influence guilty pleas. The District Court properly determined that representation of counsel during a guilty plea is an important factor in determining the voluntariness of the guilty plea.

Accordingly, **IT IS ORDERED**, that the Trial Court Judgment overruling defendant's motion to suppress

be and the same hereby is affirmed.

/s/ Leonard L. Kopowski-
Chief Justice

c.c. Mr. Robert E. Blau
Ms. Laurie Dowell
Hon. Lambert Hehl, District Judge

I, Thomas J. Calme, Clerk of the Campbell Circuit Court do hereby certify that a true and correct copy of the foregoing Judgment entered June 1, 1989 has been sent this 1st day of June, 1989 to the following persons: Thomas J. Calme, Clerk, Robert E. Blau, Laurie Dowell, and Hon. Lambert Hehl, District Judge.

THOMAS J. CALME, CLERK

BY;/s/Joanne Rowland,D.C.

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 89-ca-1273-D

DAN FERRIS MOVANT

v ON MOTION FOR DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
ACTION NO. 89-XX-4

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * * * * *

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: McDONALD, CLAYTON AND MILLER, JUDGES

Having considered the movant's motion for discretionary review and the response thereto, and being otherwise sufficiently advised, the Court ORDERS the motion be, and it is hereby, DENIED.

ENTERED: August 8,1989

/s/Michael O.McDonald
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

89-SC-632
(89-CA-1273)

DAN FERRIS MOVANT

V. CAMPBELL CIRCUIT COURT
89-XX-04

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for a review of the decision of the Court of Appeals is denied.

ENTERED: October 11,1989.

/s/Robert F. Stephens
Chief Justice

Supreme Court, U.S.
FILED
APR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1159

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DANIEL FERRIS — Petitioner

versus

COMMONWEALTH OF KENTUCKY — Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT
OF CAMPBELL COUNTY KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Kentucky courts correctly allocate the burdens of production and persuasion where a criminal defendant moves to suppress the use of a prior conviction to enhance his punishment in a subsequent criminal prosecution?

II. Did the Kentucky courts correctly consider the fact that petitioner was represented by counsel on the prior conviction he subsequently sought to suppress in the subsequent criminal proceeding?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-1159

DANIEL FERRIS — Petitioner

versus

COMMONWEALTH OF KENTUCKY — Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT
OF CAMPBELL COUNTY KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Campbell County Kentucky Circuit Court is correctly set forth in slip form in the petitioner's Appendix to his Petition.

JURISDICTION

The jurisdictional facts presented by the petitioner are correct.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner correctly states the constitutional provisions involved.

COUNTERSTATEMENT OF THE CASE

The petitioner, Daniel Ferris, entered a conditional plea of guilty in the Campbell County Kentucky District Court to the offense of driving under the influence of alcohol in violation of Kentucky Revised Statute 189A.010(2)(c) after the state District Court declined to suppress the use of two prior guilty pleas to driving under the influence which were used to enhance his sentence. Petitioner then exercised his appeal as a matter of right to the Campbell County Kentucky Circuit Court which affirmed the state District Court on June 1, 1989. The Court of Appeals of Kentucky subsequently declined petitioner's invitation to grant a discretionary review of the decision of

the Campbell County Circuit Court on August 8, 1989. The Supreme Court of Kentucky thereafter refused to review the decision of the Court of Appeals of Kentucky on October 11, 1989.

Undeterred, petitioner then filed his petition for a writ of certiorari to the Campbell County Circuit Court with this Court.

COUNTERSTATEMENT OF THE FACTS

On October 5, 1988 the petitioner, Daniel Ferris, was apprehended by police officers of the Fort Thomas Police Department who charged him with operating his automobile under the influence of alcohol in violation of Kentucky Revised Statute 189.010(2)(c) and operating a motor vehicle while having a suspended operator's license in violation of Kentucky Revised Statute 198A.090. In the proceedings before the Campbell County District Court the respondent, the Commonwealth of Kentucky, sought to try petitioner as a third time driving under the influence offender and, accordingly, enhance his sentence on the most

recent drunken-driving offense according to the provisions of Kentucky Revised Statute 189A.010(3).[1]

Petitioner, in an attempt to suppress the use by the respondent of his two prior guilty-plea based drunken driving convictions, submitted an affidavit "whereby he averred that he had made the prior pleas without having been informed of his right to a jury trial, the right to cross-examine witnesses, the right to use the subpoena power of the court, the right to remain free from self-incrimination, and without being informed that the convictions could be used against him to enhance the penalty should he receive additional convictions within five years." (Petition, p. 6).

---

[1]KRS 189A.010(3) provides: "For a third or subsequent offense within a five (5) year period, [the individual shall] be fined not less than $500 nor more than $1,000 and shall be imprisoned in the county jail for not less than 30 days nor more than 12 months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than 10 days nor more than 12 months."

The Campbell County District Court, relying upon the procedure set out by the Supreme Court of Kentucky in Dunn v. Commonwealth, 703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986), held that the mere filing of the conclusory affidavit failed to satisfy the burden of production petitioner was required to satisfy that in fact his prior guilty pleas were constitutionally defective. Further, the state District Court noted that petitioner had been represented by counsel when he entered his prior pleas of guilty.

On appeal to the Campbell County Circuit Court the decision of the inferior state trial court was affirmed. Specifically, the state circuit court held that petitioner had, indeed, failed to satisfy his burden of production under Dunn, supra and, in any event, that his conclusory claim he had not been advised of his rights was insufficient based upon Corbett v. Commonwealth, 717 S.W.2d 831 (Ky. 1986), (prior conviction properly utilized

where accused represented by counsel and no claim made that he was ignorant of his rights).

Thereafter, both the Court of Appeals of Kentucky and the Supreme Court of Kentucky declined petitioner's attempt to obtain further state court review of the decision of the Campbell County District Court.

Additional facts shall be developed, as warranted, in the argument section of this brief.

ARGUMENT

I. THE KENTUCKY COURTS CORRECTLY ALLOCATED THE BURDENS OF PRODUCTION AND PERSUASION WHEN PETITIONER SOUGHT TO SUPPRESS THE USE OF HIS PRIOR DRIVING UNDER THE INFLUENCE CONVICTIONS TO ENHANCE HIS SENTENCE IN THE SUBSEQUENT CRIMINAL PROSECUTION.

Petitioner contends that the rule set out by the Kentucky high court in Dunn v. Commonwealth, 703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986) is "simply invalid" and that this Court should, therefore, issue a writ of certiorari to review the state court proceedings in this case. The Commonwealth of

Kentucky disagrees. The Supreme Court of Kentucky in Dunn, supra, allocated the respective burdens of production and persuasion in suppression hearings, where an accused challenges the use of a prior conviction in subsequent prosecution under Kentucky's habitual criminal statute, Kentucky Revised Statute 532.080. The precise holding of the Kentucky Supreme Court was as follows, Dunn, supra at 876:

> In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgment of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or

> other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

The procedure set out by the state court in Dunn, supra is also applicable to prosecutions under the driving under the influence statute where the Commonwealth intends to rely on earlier convictions in seeking the enhancement of any possible sentence. Ratliff v. Commonwealth, 719 S.W.2d 445 (Ky.App. 1986).

While a panel of the United States Court of Appeals for the Sixth Circuit, in a 2-1 decision, has opined that "the methodology and standards utilized by the Kentucky Supreme Court do not comply with federal standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution," Dunn v. Simmons, 877 F.2d 1275, 1279 (6th Cir. 1989), cert. denied, ___ U.S.L.W. ____ (U.S. March 26, 1990)

(No. 89-707), the Commonwealth's position in this case is the same as that taken in Dunn v. Simmons, supra - namely, that the Kentucky procedure passes constitutional muster.

Kentucky's imposition of a burden of production upon a criminal defendant attempting to suppress a prior guilty plea based conviction in a later criminal proceeding is consistent with the principles set out by this Court in Patterson v. New York, 432 U.S. 197, 201-202 (1977):

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v California, 347 US 128, 134, 98 L Ed 561, 74 S Ct 381 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process

> Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Speiser v Randall, 357 US 513, 523, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); Leland v Oregon, 343 US 790, 798, 96 L Ed 1302, 72 S Ct 1002 (1952); Snyder v Massachusetts, 291 US 97, 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934). [emphasis added]

The Kentucky procedure simply requires a defendant, having avoided the burden of trial and often having received a sentence less than the maximum possible by entering a plea of guilty, to come forward with some sort of evidentiary basis to support his motion to suppress a presumptively valid conviction based on an earlier guilty plea. No fundamental notions of justice are offended by the Kentucky procedure.

Kentucky's procedure is consistent with what was written in Loper v. Beto, 405 U.S. 473, 480 n. 6 (1972) in discussing the obligation a criminal defendant bears to substantiate an allegation that his constitutional rights were violated in a prior criminal proceeding:

> * * * "[T]he Court of Appeals * * * did not rest its decision on a finding that the petitioner had failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. See Burgett v. Texas, 389 U.S. 109, 114-115, 19 L.Ed.2d 319, 324, 88 S.Ct. 258; Losieau v. Sigler, 406 F.2d 795, 803; Williams v. Coiner, 392 F.2d 210, 212-213"

The Kentucky procedure is consistent with this statement from Loper v. Beto, supra, and the cases cited therein. The Kentucky procedure simply requires the accused to do what is required in the federal courts when the constitutional validity of a prior conviction is contested - present evidence to overcome the presumption of regularity. United States v. Chrans, 869 F.2d 1084, 1087 (7th Cir. 1989) (defendant bears burden in habeas corpus proceeding to prove waiver of jury trial not freely

and intelligently made); Robards v. Rees, 789 F.2d 379, 385 (6th Cir. 1986) (petitioner bears burden of producing evidence that he was not represented by counsel); Luna v. Black, 772 F.2d 448 (8th Cir. 1985) (where accused introduces evidence that prior conviction constitutionally infirm, burden shifts back to government to prove otherwise).

The Kentucky procedure does not permit the prosecution to satisfy its burden of persuasion by invoking a presumption. It simply requires that before the prosecution is forced to assume a new burden of persuasion, as to what has been a presumptively valid plea, a defendant must produce some evidence to support his claim of noncompliance with Boykin v. Alabama, supra. The Kentucky Supreme Court specifically cautioned that once the defendant satisfies his burden of production "[a] silent record simply will not suffice." Dunn, supra at 876.

The procedure under attack by petitioner is consistent with the approach taken by several of Kentucky's sister states. In People v. Sumstine, 687 P.2d 904 (Calif. 1984) the California Supreme Court held that a criminal defendant would be required to produce evidence that his Boykin rights were infringed when he sought to suppress the use of a prior conviction in a subsequent sentence enhancement hearing, Sumstine, supra at 913:

> Yet the silence of the record is not entirely without relevance. When a defendant has made allegations sufficient to justify a hearing, the court must conduct an evidentiary hearing in the fashion set forth in Coffey: "[T]he prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant 'has suffered such previous conviction.' (Pen.Code, § 1025.) . . . [W]hen this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his constitutional [Boykin/Tahl rights were] infringed in the prior proceeding at issue. . . . [I]f defendant bears this burden, the prosecution shall have the

> right to produce evidence in rebuttal." [Fn. omitted.) (67 Cal.2d at p. 217, 60 Cal.Rptr. 457, 430 P.2d 15.) The state at first need prove only the fact of the prior conviction, but once the defendant has produced evidence tending to show his constitutional rights were infringed, it will not be sufficient rebuttal for the state to simply invoke the regularity of the silent record.

The Kentucky procedure and the one set out in Sumstine, supra, are virtually identical. See also, State v. Triptow, 770 P.2d 146 (Utah 1989); State v. O'Neil, 580 P.2d 495 (N.M.App. 1978); State v. Annino, 613 P.2d 84 (Or.App. 1980). In fact, at least two states place the burden of proving the unconstitutionality of a prior conviction upon the defendant. People v. Harris, 61 N.Y.2d 9, 459 N.E.2d 170 (1983); Disheroon v. State, 687 S.W.2d 332, 334 (Tex.Cr.App. 1985).

The rule of law announced by the Supreme Court of Kentucky concerning the burdens of production and persuasion in suppression hearings is in conformity with prior decisions

of this Court and with the decisions of several of Kentucky's sister states. The holding of the Kentucky Supreme Court concerning the burdens of production and persuasion were correct and were properly applied in this case by the state courts.

II. THE KENTUCKY COURTS PROPERLY CONSIDERED THE FACT THAT PETITIONER WAS REPRESENTED BY COUNSEL ON HIS PRIOR CONVICTIONS HE SUBSEQUENTLY SOUGHT TO SUPPRESS.

Petitioner concedes that when he pled guilty to driving under the influence in 1984 and 1985 "that he was both times represented by counsel." (Petition, p. 15). The Campbell County Circuit Court, in reviewing petitioner's appeal to that court, concluded that petitioner had failed to produce evidence which overcome the presumption of regularity of the prior pleas. Nevertheless, the Circuit Court went on to note "that the District Court specifically found that counsel in each action was well qualified and presumed that the appellant

[petitioner] had been informed of his rights." (Petition Appendix, 2a). The state court expressly relied on Corbett v. Commonwealth, 717 S.W.2d 831 (Ky. 1986) wherein the Supreme Court of Kentucky rejected an attack on a prior guilty plea which was supported by evidence that the accused was represented by counsel at all prior procedures and where the defendant made no claim he was ignorant of his rights. Given the fact that petitioner's affidavit simply recited that "no one informed him of the rights he relinquished by pleading guilty.", (Petition, p. 15), and that there was no dispute petitioner was actually represented by counsel, the state courts correctly declined to suppress the prior 1984 and 1985 convictions.

The law, as it should, presumes that defense counsel explains the nature of the crime in sufficient detail so as to give the accused notice of that to which he is being asked to admit. Henderson v. Morgan, 426 U.S. 637

(1976); Marshall v. Lonberger, 459 U.S. 422 (1983). Petitioner's suppression motion was correctly denied in the state trial court since the law will presume that petitioner had been informed by counsel of the nature of that which he was pleading guilty and the absence of any claim that in fact petitioner did not know of the rights he was foregoing by entering a plea of guilty. The affidavit offered by petitioner simply averred that he had not been informed of the rights he was foregoing by entering a plea of guilty and not that he was in fact ignorant of those rights when he entered his plea. Petitioner was provided a full and fair opportunity to come forth with evidence that would demonstrate that his prior pleas were something less than freely, voluntarily and intelligently entered. North Carolina v. Alford, 400 U.S. 25 (1970). The state courts properly considered that petitioner had been represented by counsel at his prior guilty pleas.

CONCLUSION

The petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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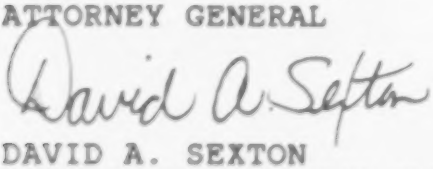

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